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Third report on State responsibility

by Mr. James Crawford, Special Rapporteur

Addendum

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IV. Invocation of responsibility by an injured State (*continued*)*

D. Countermeasures by an injured State

285. The remaining issue concerning invocation of responsibility by an injured State relates to the taking of countermeasures. Consistently with the approach so far taken to the invocation of responsibility (Part Two *bis*), it is proposed to deal first with the taking of countermeasures in what may be regarded as the "normal" case, i.e. where an injured State confronts the responsible State (as it were alone or severally). In a subsequent section of the present report, the broader range of cases involving countermeasures with respect to multilateral obligations will be discussed, as an aspect of the broad group of issues associated with former articles 19, 40, and 51-53.

1. Introduction

286. Currently located as chapter III of Part Two, the provisions on countermeasures were the subject of extensive debate in the period 1994-1996, on the basis of Professor Arangio-Ruiz' detailed reports.[530] So far as the second reading process is concerned, initial discussion took place in 1999 on the basis of the present Special Rapporteur's Second Report, which raised a number of general issues.[531] The outcome of the debate was summarized in the Commission's Report for 1999 as follows:

> "a minority in the Commission preferred retaining the linkage between countermeasures and Part Three. However, even they did not defend the inequality that existed in the relationship between the taking of countermeasures and dispute settlement. Instead, a close relationship was supported out of concern for the danger of possible abuse inherent in countermeasures and the need to control them as much as possible. [...]
>
> [The] proposal to delink the two did not prejudice the position that issues arising out of the resort to countermeasures could be the subject of dispute settlement. Yet, it was untenable to make compulsory dispute settlement procedure in the draft articles available only to the State which had committed the internationally wrongful act. [...]
>
> [T]he call for equality in treatment between States within the existing arrangement, was really a call for a general system of dispute settlement in relation to the draft articles ... [This] implied that the draft articles would have to take the form of a draft convention, which had not yet been decided."[532]

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* The Special Rapporteur wishes to acknowledge the assistance of Pierre Bodeau, Jacqueline Peel, and Ann Bodley in the preparation of this Addendum.

530 See the *Fourth Report* (1992), in *Yearbook ... 1992*, vol. II (Part One), pp. 1-49; *Sixth Report* (1994), Doc. A/CN.4/461 and Add.1-3; *Seventh Report* (1995), Doc. A/CN.4/469 and Add.1 and 2. For the summary of the debates, see *Yearbook ... 1992*, vol. II (Part Two), pp. 18-40 (paras. 117-276); *Yearbook ... 1994*, vol.II (Part Two), pp. 142-144 (paras. 275-288) and pp. 151-152 (paras. 347-353); *Yearbook ... 1995*, vol. II (Part Two), p. 61 (paras. 340-343).

531 See A/CN.4/498/Add. 4, 19 July 1999, and for a summary of the debate, *ILC Report 1999*, paras. 426-453.

532 Ibid, paras. 450-452.

Pending a solution to questions of countermeasures raised by articles 47-50, the Commission in 1999 did not adopt a precise formulation of article 30, under which the unlawfulness of conduct taken by way of countermeasures is precluded.[533]

287. Following the preliminary debate held in 1999, the Special Rapporteur believes that the provisions on countermeasures should be included in Part Two *bis*, but without any special linkage to dispute settlement. The reason for inclusion in Part Two *bis* is that in general, countermeasures should be seen as performing an instrumental function of ensuring compliance, and not as punitive measures or sanctions. The reason for de-linking countermeasures and dispute settlement is, in short, that such a linkage gives a one-way right to the target State (*ex hypothesi*, the State which has committed an internationally wrongful act) to invoke third party settlement, yet such a right must equally be given to the injured State, in lieu of taking countermeasures. If countermeasures are dealt with in detail in Part Two *bis*, a simple reference to them in Part One, chapter V as circumstances precluding wrongfulness will suffice.

288. This view appears to command general support in the Commission, at least as a first hypothesis. On the other hand, if no agreement can be reached as to the content of the provisions dealing with countermeasures (in particular, so far as they concern the regime of countermeasures in respect of multilateral obligations), other alternatives may have to be considered. Of these, the most obvious would be the further specification of the conditions for countermeasures in Part One, chapter V.

289. It should be noted that the International Court's treatment of countermeasures in the *Case concerning the Gabčíkovo-Nagymaros Project* was generally supportive of the balance in the Draft articles, while clarifying a number of issues. The Court, in a bilateral context in which no issue of prohibited countermeasures were at stake, endorsed four distinct elements of the law of countermeasures: (a) the countermeasure must be taken in response to an unlawful act;[534] (b) it must be preceded by a demand for compliance by the injured State;[535] (c) the countermeasure must be proportionate, in the sense of "commensurate with the injury suffered, taking account of the rights in question";[536] and (d) the countermeasure must have as its purpose "to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible".[537] In particular, the Court accepted the conception of countermeasures underlying article 47. It also endorsed the requirement of proportionality, but added useful clarifications in relation to the latter, adopting a stricter approach than the language of article 49 might imply.

290. The comments of Governments on countermeasures addressed both the general question whether articles 47-50 should be retained, and specific questions of drafting and balance.[538] At a general level, Governments have referred to:

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[533] See *ILC Report 1999*, para. 344.

[534] *ICJ Reports*, 1997, p. 7 at pp. 55-56 (para. 83).

[535] Ibid., p. 56 (para. 84). The Court did not mention any requirement of prior negotiations. In that case there had been exhaustive negotiations, so the point did not arise.

[536] Ibid., p. 56 (para. 85).

[537] Ibid., pp. 56-57 (para. 87).

[538] See *Second Report on State Responsibility*, 19 July 1999, Doc. A/CN.4/498/Add.4, paras. 374-379.

- The difficulty of distinguishing in practice between countermeasures and "interim measures of protection" as referred to in article 48 (1);
- The question whether the countermeasures should have some nexus to the breach (i.e. the notion of reciprocal countermeasures);
- The eventuality of "collective measures" and of countermeasures in case of breach of multilateral or *erga omnes* obligations;
- The impact of the distinction between "crimes" and "delicts" on the regime of countermeasures, and more generally the question whether countermeasures have a punitive function;
- The impact of countermeasures on the economic situation of the target State and on human rights in that State, as well as possible impacts on third States;
- The unbalanced nature of countermeasures, which favour only the most powerful States.

291. In the Special Rapporteur's view, while these criticisms and queries need to be addressed, they do not lead to the conclusion that the draft articles should be deleted. In his view, countermeasures are properly considered as aspects of the invocation of State responsibility (i.e., as "instrumental consequences", to adopt the terminology of Mr. Arangio-Ruiz). A balanced regime of countermeasures is more likely to be of use in controlling excesses than silence on a vitally important subject, one to which, moreover, the Commission is otherwise unlikely to be able to contribute. In addition, it may be said that in general the response to the Commission's work on the subject so far has been positive. For these reasons it is proposed to consider, in this section, the existing articles and the comments made on them, and to do so from the perspective of countermeasures taken by an injured State (as that term is proposed to be defined in article 40 *bis* (1)). Countermeasures in respect of multilateral obligations, where the State or States taking the countermeasures are not themselves injured States, present altogether more difficult problems, which can only be dealt with once the basic issues of countermeasures taken by an injured State in the strict sense have been resolved.

2. Review of existing chapter III (articles 47-50)

292. Articles 47-50 presently form a rather integrated group, and it is not possible to deal with issues affecting, for example, article 47 without considering later articles. Accordingly, it is proposed to summarize the content of and government comments upon all four articles first, before turning to discuss in a thematic way the issues raised thereby.

(a) Article 47 (Countermeasures by an injured State)

293. Article 47 provides:

> "1. For the purposes of the present articles, the taking of countermeasures means that an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act in order to induce it to comply with its obligations under articles 41 to 46, as long as it has not complied with those obligations and as necessary in the light of its response to the demands of the injured State that it do so.

2. The taking of countermeasures is subject to the conditions and restrictions set out in articles 48 to 50.

3. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified under this chapter as against the third State."

Thus article 47 is a hybrid, giving a "definition" of countermeasures, referring to the limitations on countermeasures provided for articles 48-50, and dealing with the position of third States in respect of countermeasures.

294. According to the commentary, article 47 specifies the "entitlement of the injured State" to take "lawful countermeasures".[539] By contrast, the ostensive definition in paragraph (1) refrains from saying that the injured State is entitled to take countermeasures, or that they are lawful. It simply says what they are. Their unlawfulness is precluded not by article 47 but by virtue of article 30. This is, however, somewhat evasive: the justification for dealing with countermeasures in former Part 2 is that they are measures which can be taken, in certain circumstances, to induce a State in breach of an international obligation to comply with its "secondary" obligations of cessation and reparation. And the commentary treats them on this footing, while at the same time stressing the limitations on their use. In particular: (a) countermeasures can only be taken in response to conduct actually unlawful; a good faith belief in its unlawfulness is not enough;[540] (b) their purpose is limited to "the pursuit by the injured State of cessation and reparation"; in particular it is not punitive but instrumental;[541] (c) they "may be applied only as a last resort where other means ... have failed or would clearly be ineffective in inducing the wrongdoing State to comply with its obligations";[542] (d) they may only be applied to the extent they are "necessary" for that purpose,[543] and (e) in assessing their necessity the injured State must take account of "the wrongdoing State's response to its demands", thus implying a dialogue between the injured State and the target State on the questions of cessation and reparation.[544] Obviously countermeasures only legitimize the conduct in question as between the injured State and the target State, although this does not exclude the possibility, "in an interdependent world where States are increasingly bound by multilateral obligations", of "incidentally affecting the position of third States".[545] According to the commentary, this is "of particular relevance in cases of possible violation by the injured State of rules setting forth *erga omnes* obligations".[546] But, despite this reference, the articles on countermeasures pay almost no attention to the issue of *erga omnes* obligations: the world of articles 47-50 is that of the injured State facing the responsible State *à deux*. As noted already, it is appropriate to consider this situation first, before turning to the more complex issues of collective obligations

[539] Commentary to article 47, para. (1).
[540] Ibid., para. (1).
[541] Commentary to article 47, para. (2). In this respect the conception of countermeasures in Part 2 is narrower than that in article 30 as adopted on first reading, which included certain "sanctions".
[542] Ibid., para. (4).
[543] Ibid., para. (5).
[544] Ibid., paras. (6)-(7).
[545] Ibid., para. (7).
[546] Ibid., para. (8).

and collective countermeasures. But the point may be made that it is odd even to contemplate the injured State breaching an obligation *erga omnes* by way of a countermeasure taken vis-à-vis a single State.

295. Only a few Governments have commented generally on article 47. Apart from France, which considers that "article 47 is something of an amalgam" — the definition in paragraph 1 having apparently "no link with the other two paragraphs"[547] — they are generally supportive of it and favour the reinforcement and clarification of some of the principles it embodies. Some Governments call for the Commission not only to codify the existing customary law on countermeasures but also "to develop clear rules limiting the circumstances" under which they can be resorted to.[548] For example, one Government suggests that "only States directly injured by a wrongful act should have the right to react and even then they should have to prove that they have suffered harm."[549]

296. Paragraphs 1 and 3 have given rise to more specific observations. As to paragraph 1, a number of Governments express concern as to the potentially punitive function of countermeasures, although this view was not universal. Thus Greece suggests that chapter III as a whole "would appear to be more appropriate for breaches characterized as delicts than for breaches that constitute international crimes"; it further suggests that the language of chapter III should better reflect that distinction.[550] By contrast, other Governments firmly assert that "countermeasures should not be punitive in nature, but should be aimed at restitution and reparation or compensation."[551] In order to avoid any doubt on the issue, Ireland suggests that the sentence "It does not include the taking of measures of a punitive nature" be added to paragraph 1.[552] Like all the other Governments which have commented on article 47,[553] Ireland also agrees with the principle embodied in paragraph 3 on the protection of third States, but suggests "a slight amendment" to it: "[s]ince other international persons and bodies, such as intergovernmental organizations, may be injured by a countermeasure directed at a State", the Irish Government proposes that the term "third party" be substituted by the term "third State".[554]

297. France and Denmark (on behalf of the Nordic countries) do not question the substance of paragraph 3, but consider that it would be better dealt with in a separate provision.[555] Indeed Denmark supports a more general redrafting of article 47, in keeping with a "cautious approach" aimed at limiting the entitlement of resorting to countermeasures. It thus proposes to merge articles 47 to 49 into a single article entitled "Conditions of resort to countermeasures", which would first state that

[547] A/CN.4/488, p. 118.

[548] A/CN.4/496, p. 18, para. 121.

[549] Ibid.

[550] A/CN.4/492, p. 15. See, for a different view, Mongolia (A/CN.4/488, p. 116).

[551] A/CN.4/504, p. 20, para. 74. Singapore criticizes the "apparent contradictions" between the commentaries to articles 30 and 47 in that respect (see A/CN.4/488/Add.3, pp. 5-6, para. 14).

[552] A/CN.4/488, p. 118.

[553] See A/CN.4/496, p. 18, para. 121 and A/CN.4/504, p. 20, para. 74. Singapore considers that paragraph 3 "may not go far enough" and that the draft articles "may need to address concerns on abuses against and contingencies for innocent third States" (A/CN.4/488/Add.3, p. 6, para. 17).

[554] A/CN.4/488, p. 118.

[555] Ibid. For France, this principle is "hardly appropriate in this article (State A can obviously not take vengeance on State C for what State B has done to it)".

resort to countermeasures is unlawful unless some conditions are fulfilled, and then go on with the enumeration of the relevant conditions.[556]

(b) Article 48 (Conditions relating to resort to countermeasures)

298. Article 48 lays down certain procedural conditions for the taking of countermeasures, or for their continuation in force. It was by far the most controversial of the four articles adopted on first reading. It provides:

> "1. Prior to taking countermeasures, an injured State shall fulfil its obligation to negotiate provided for in article 54. This obligation is without prejudice to the taking by that State of interim measures of protection which are necessary to preserve its rights and which otherwise comply with the requirements of this Chapter.
>
> 2. An injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under Part Three or any other binding dispute settlement procedure in force between the injured State and the State which has committed the internationally wrongful act.
>
> 3. Provided that the internationally wrongful act has ceased, the injured State shall suspend countermeasures when and to the extent that the dispute settlement procedure referred to in paragraph 2 is being implemented in good faith by the State which has committed the internationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.
>
> 4. The obligation to suspend countermeasures ends in case of failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure."

299. The commentary notes a central disagreement within the Commission on article 48. While all agreed that peaceful means for the settlement of the dispute should be pursued, the question was to what extent this should be a necessary prerequisite for taking countermeasures, given (a) the possibilities for a State to prolong negotiations and engage in dilatory procedures, and (b) the fact that "some forms of countermeasures (including some of the most readily reversible forms, for example, the freezing of assets) can only be effective if taken promptly".[557] The tension between maintaining the effectiveness of countermeasures and preventing premature resort to them is sought to be resolved by a distinction between "interim countermeasures" (described as "interim measures of protection") and other measures. According to the commentary, "interim measures" are those which are

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[556] According to Denmark, on behalf of the Nordic countries (ibid., p. 117), these conditions are as follows:

"(a) The actual existence of an internationally wrongful act;

(b) The prior submission by the injured State of a protest combined with a demand of cessation/reparation;

(c) Refusal of an offer to settle the dispute through amicable settlement procedures, including binding third-party procedures;

(d) Appropriate and timely communication by the injured State of its intention to resort to countermeasures;

(e) Proportionality, i.e., the measures taken by the injured State shall not be out of proportion to the gravity of the internationally wrongful act and the effects thereof."

[557] Commentary to article 48, para. (2).

"necessary ... to preserve [the] legal rights" of the injured State. By contrast "full-scale countermeasures" — a term not used in the articles themselves — may not be taken without an initial attempt to resolve the dispute by negotiation.[558] Interim measures are said to be inherently reversible: thus "the comparison is between the temporary detention of property and its confiscation, or the suspension of a licence as against its revocation".[559]

300. A second way of striking a balance between the interests of the State taking countermeasures and the target State is to require that countermeasures be suspended in certain conditions, specified in paragraphs (3) and (4). A significant point here is that the provisions of articles 47-50 are associated with arrangements for the compulsory third party settlement of disputes concerning countermeasures, proposed on first reading and referred to already.[560] The commentary summarizes the effect of these provisions as follows: "if the basic conditions for countermeasures laid down in article 47 are met, and if initial negotiations have failed to produce a solution the injured State may take countermeasures without any prior resort to third party dispute settlement procedures. But if it does take countermeasures, the State against whom they are taken may resort to binding arbitration... or to other applicable binding third party settlement of the dispute. If the allegedly wrongdoing State does resort to such a procedure, and implements it in good faith, and provided the wrongful act itself has ceased, the countermeasures must be suspended".[561] This suspension is however conditional; if the target State fails to cooperate in third party dispute settlement, or fails to honour an order or indication of provisional measures issued by a third party, the suspension may be lifted.[562] The commentary expresses the view that this system "marks an important advance on the existing arrangements for the resolution of disputes involving countermeasures", in particular by tending to "reduce that element of the system of countermeasures which tended to a spiralling of responses".[563]

301. The Czech Republic and Ireland note the "debate and controversy in the Commission" over article 48.[564] Government comments on it equally reflect a broad range of differing, sometimes conflicting, views. On the one hand, Switzerland, for example, is "satisfied with the provisions on the settlement of disputes with respect to countermeasures".[565] Other Governments consider that article 48 should be substantially amended, if not omitted altogether. France for example suggests an entirely new formulation for the provision,[566] while the United States is of the view

[558] Ibid., para. (4).

[559] Ibid.

[560] See above, para. 265.

[561] Commentary to article 48, para. (11).

[562] Ibid., para. (12), summarizing the effect of article 48 (4).

[563] Ibid., para. (13).

[564] A/CN.4/488, p. 119; in this context Ireland "doubts the wisdom of linking the conditions relating to countermeasures to" the provisions on dispute settlement.

[565] Ibid., p. 120. See also Japan, which considers that "articles 48 to 50 are, generally speaking, well drafted in that they would prevent abuse of countermeasures by imposing not only procedural but also substantive restrictions" (A/CN.4/492, p. 15).

[566] The French proposition reads as follows:

"1. An injured State which decides to take countermeasures shall, prior to their entry into force:

(a) submit a reasoned request calling upon the State which has committed the act alleged to be internationally wrongful to fulfil its obligations;

that it should "at the least, be placed in an optional dispute settlement protocol".[567] Without prejudice to its general position as to the treatment of countermeasures in the draft articles, the United Kingdom proposes the addition of a provision "corresponding to article 45 of the Vienna Convention on the Law of Treaties, barring recourse to countermeasures by a State after it has acquiesced in a breach of its rights";[568] particular attention should also be given to the situation where "[s]everal States may take countermeasures but the State principally affected may decide to take none, or even to consent to the breach."[569]

302. Apart from these general observations and suggestions, government comments mostly focus on paragraphs 1 and 2. Two main issues are discussed as far as paragraph 1 is concerned. The first relates to the obligation to negotiate, which must be fulfilled prior to the taking of full-scale countermeasures. Some Governments clearly support this provision, on the assumption that countermeasures are a solution of "last resort"[570] and not "a direct and automatic consequence of an internationally wrongful act".[571] Others do not deny the existence of the obligation to negotiate but interpret it rather narrowly: Japan argues for example that, when countermeasures are aimed at inducing the wrongdoing State to restore the pre-existing situation as quickly as possible, "there is not enough time to negotiate"; accordingly, the prevailing interpretation should be that "the injured State is permitted to take countermeasures if the wrongdoing State has not made any specific response to its proposal within a reasonable period of time".[572] Other Governments oppose the inclusion of such a provision, mainly on the ground that the obligation to negotiate prior to the taking of countermeasures is not part of customary international law,

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(b) notify that State of the nature of the countermeasures it intends to take;

(c) agree to negotiate in good faith with that State.

2. However, the injured State may, as from the date of such notification, implement provisionally such countermeasures as may be necessary to preserve its rights.

3. When the internationally wrongful act has ceased, the injured State shall suspend countermeasures, provided that the parties have initiated a binding dispute settlement procedure under which orders binding on the parties may be issued.

4. The obligation to suspend countermeasures ends in case of failure by the State which has committed the internationally wrongful act to honour an order emanating from the dispute settlement procedure."

A/CN.4/488, p. 119.

[567] Ibid., p. 120. The same Government adds that "[a]s a mandatory system of conditions, [article 48] is without foundation under customary international law" (see also A/CN.4/496, pp. 18-19, para. 121).

[568] A/CN.4/488, p. 120. For the United Kingdom Government, the Commission should limit itself to article 30 and omit articles 47 to 50 (ibid., p. 116).

[569] Ibid.

[570] Argentina proposes that the text "reverse the presumption of the lawfulness of countermeasures", considered as "an act merely *tolerated*" by international law (A/CN.4/488/Add.1, pp. 7-8; italics in the original; see also A/CN.4/496, p. 18, para. 120 and A/CN.4/504, p. 20, para. 74).

[571] Czech Republic, adding that "[t]he purpose of these preconditions is to reduce the likelihood of premature, and thus improper, resort to countermeasures" (A/CN.4/488, p. 121). Austria and France — the latter believing that "the taking of countermeasures should, as far as possible, be associated with a process for the peaceful settlement of disputes" — also favour the prior obligation to negotiate (ibid.; see also A/CN.4/496, p. 18, para. 121).

[572] A/CN.4/492, p. 15. In a similar vein, Ireland considers that the State willing to take countermeasures "should normally negotiate with the wrongdoing State" in order to obtain cessation and reparation, but that managing to impose upon them "any more wide-ranging obligation prior to taking countermeasures" is unlikely (A/CN.4/488, pp. 119-120).

unlike the prior demand for cessation and reparation.[573] For the United Kingdom, for example, paragraph 1 proposes "a novel and unjustified restraint upon States which is impractical and utopian in the fast-moving modern world".[574] The United States goes further, stating that "the draft should reflect the fundamental customary rule that countermeasures are permissible prior to and during negotiations".[575]

303. The second issue raised in respect of paragraph 1 relates to the reference to "interim measures of protection". With the exception of Denmark (on behalf of the Nordic countries), which proposes that "[t]he concept of interim measures of protection [...] be singled out for special mention,"[576] other Governments consider that it will be difficult in practice "to distinguish interim measures from countermeasures proper".[577] For Argentina, interim measures "would appear to differ from countermeasures not in their nature but in their degree or duration".[578] The United Kingdom vigorously denounces "an unfortunate use of language which may suggest a conceptual link, which it considers entirely misconceived, with interim measures in the International Court of Justice."[579] The United States questions whether interim measures "would, like countermeasures, be unlawful absent the precipitating wrongful act"; if not, they would appear unnecessary in its view, but if they are, "it is unclear how in concrete circumstances the term might be applied."[580]

304. As far as article 48, paragraph 2 is concerned, even those Governments which support in principle the existence of a link between the taking of countermeasures and the dispute settlement regime embodied in Part Three of the draft, express some doubts concerning its wording and underlying conception. The Czech Republic for example, although "not unsympathetic to the idea of monitoring, at least *a posteriori*, the lawfulness of countermeasures", considers that paragraph 2 "introduces a relatively rigid organic link between Parts Two and Three" and thus prejudges the question of the binding nature of that latter part to the detriment of the "substantive rules concerning countermeasures."[581] For the United States, "[p]aragraph 2 contains two flaws with respect to the draft's system of arbitration". First, the system of compulsory arbitration proposed in article 58, paragraph 2 "is not supported by customary international law, would be unworkable in practice" and would create "a serious imbalance in the treatment of injured and wrongdoing

[573] United States and Germany, the latter believing it "quite unreasonable to expect the injured State to refrain from taking (peaceful) countermeasures" before exhausting all means of friendly dispute settlement (ibid., pp. 120-121; see also A/CN.4/504, pp. 20-21, para. 74).

[574] A/CN.4/488, p. 122.

[575] Ibid., p. 123.

[576] Ibid., p. 121. The Czech Republic seems also to endorse the notion of interim measures, by noting that their suspension "would render the countermeasures meaningless" (ibid.; see also A/CN.4/496, p. 18, para. 121).

[577] Germany, adding that "the new category of 'interim measures' may open the way to attempts to circumvent the limitations traditionally attached to the taking of reprisals" (A/CN.4/488, p. 122). See also Ireland, fearing that the distinction may "merely fuel further disagreement between States" (ibid., p. 120), and Japan, calling for a clearer definition of interim measures (A/CN.4/492, pp. 15-16; see also A/CN.4/504, p. 21, para. 76).

[578] A/CN.4/488/Add.1, p. 8.

[579] A/CN.4/488, p. 122.

[580] Ibid., pp. 122-123.

[581] Ibid., p. 123.

States", imposing "an unacceptable cost" on the former.[582] Secondly, the reference to "any other binding dispute settlement procedure in force" between the parties could be misinterpreted "as constituting consent to resort to dispute settlement procedures where the existing procedure requires mutual consent".[583] At the same time, it has been suggested by another Government that, even if no link is established between the taking of countermeasures and the dispute settlement procedure, resorting to countermeasures should be made conditional upon the "refusal by the wrongdoing State of an offer to settle the matter through a binding third-party procedure".[584]

305. As to paragraph 3, Japan supports the provision but finds its wording "rather vague": it suggests that, if the procedure mentioned is judicial, this should be clearly stated.[585] The United States considers that the requirement embodied in paragraph 3 "may lead to further delay and abuse by the wrongdoing State".[586]

(c) Article 49 (Proportionality)

306. Article 49 lays down the basic requirement of proportionality as a condition for a legitimate countermeasure. It provides that:

> "Countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State."

307. The commentary described the principle of proportionality as "a general requirement for the legitimacy of countermeasures or reprisals ... a crucial element in determining the lawfulness of a countermeasure in the light of the inherent risk of abuse as a result of the factual inequality of States".[587] The question is not the existence of the requirement but the rigour with which it is to be applied. It justifies the negative formulation of article 49 ("not ... out of proportion") by reference to formulations in decided cases such as *Naulilaa*[588] and the *Air Services Arbitration*.[589] The requirement of proportionality is thus flexible, allowing to be taken into account both the gravity of the wrongful act and its effects on the injured State.[590] In particular, it is not intended "unduly to restrict a State's ability to take effective countermeasures in respect of certain wrongful acts involving obligations *erga omnes*, for example violations of human rights. At the same time, a legally injured State, as compared to a materially injured State, would be more limited in its

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[582] Ibid., pp. 123-124. See also A/CN.4/504, p. 20, para. 75, where it is suggested that the State taking countermeasures and the target-State "should have the same possibilities of recourse to means of peaceful settlement", and Japan (A/CN.4/492, p. 17).

[583] A/CN.4/488, p. 124.

[584] A/CN.4/504, p. 20, para. 75.

[585] A/CN.4/492, p. 16.

[586] A/CN.4/488, p. 124.

[587] Commentary to article 49, paras. (1)-(2).

[588] *UNRIAA*, vol. II, at p. 1028 (excluding "représailles hors de toute proportion avec l'acte qui les a motivées"). The case concerned armed reprisals and not countermeasures in the sense of Chapter III.

[589] *Case Concerning the Air Services Agreement of 27 March 1946* (1978) 54 I.L.R. 304 at p. 338 (para. 83) ("not ... clearly disproportionate when compared to [the action] taken by France").

[590] Commentary to article 49, paras. (6)-(8).

choice of the type and the intensity of measures that would be proportional to the legal injury it has suffered."[591]

308. All Governments which commented on article 49 agree that the principle of proportionality of countermeasures is part of customary international law;[592] some see it as an element "of crucial importance",[593] or as "one of the fundamental conditions to be met if the resort to countermeasures is to be legitimate".[594] A few express concerns as to the drafting of article 49,[595] but none doubt the relevance of the reference to the "degree of gravity of the internationally wrongful act".[596] The Czech Republic considers that the "function of the principle of proportionality becomes even more important in the case of countermeasures taken in response to a crime"; in its view, "[t]he effects of a crime may be felt by the community of States to varying degrees, and the principle of proportionality should therefore be applied by each injured State individually."[597]

309. The question raised by States in respect of article 49 is rather whether the provision should be refined by adding other relevant elements in the determination of proportionality. Austria for example, emphasizing the "regulating effect" provided by the principle of proportionality, calls for further refinement of the concept, at least in the commentary to the article.[598] Both Ireland and the United States consider it possible to define the notion more comprehensively in the draft article itself, even though "[p]roportionality is a matter of approximation, not precision, and requires neither identity nor exact equivalency in judging the lawfulness of a countermeasure."[599] These Governments criticize in particular the fact that the purpose of a countermeasure is not taken account of in the assessment of proportionality. Referring to the recent application of the concept or proportionality by international human rights bodies such as the European Court of Human Rights, Ireland declares that "both the particular aim of the countermeasure [i.e., cessation and/or reparation] and the particular form of reparation sought, if any, may indeed be relevant to the question of the proportionality of a countermeasure".[600] Similarly, for the United States, "[p]roportionality means

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[591] Ibid., para. (9). The text of the Draft articles as adopted on first reading, however, makes no distinction between "legal injury" and "material injury".

[592] See e.g. Germany (A/CN.4/488, p. 125, referring to the Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*), Ireland (*ibidem*), the United States (*ibid.*, p. 126), and A/CN.4/504, p. 20, para. 74.

[593] Austria (A/CN.4/488, p. 124).

[594] Czech Republic, loc. cit.

[595] Ireland endorses the negative formulation of the condition (ibid., p. 125), but France proposes "replacing the phrase 'out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State' by the phrase 'out of proportion to the effects of the internationally wrongful act on the injured State and the degree of gravity thereof' ...": ibid.

[596] See e.g. Germany (ibid.). For the United States, however, the formulation adopted on first reading gives "undue emphasis" to a "vague concept" of gravity, which "reflects only one aspect of customary international law" (ibid., p. 127).

[597] Ibid., p. 124.

[598] Ibid. For the German Government, "an assessment of proportionality has to involve consideration of all elements deemed to be relevant in the specific circumstances" (ibid., p. 125).

[599] United States, adding that "a degree of response greater than the precipitating wrong may be appropriate to bring the wrongdoing State into compliance with its obligations" (ibid., p. 127); see also Ireland (ibid., p. 125).

[600] Ibid., p. 126.

principally that countermeasures should be tailored to induce the wrongdoer to meet its obligations under international law, and that steps taken towards that end should not escalate but rather serve to resolve the dispute."[601]

310. Two other points are raised with respect to article 49. Ireland questions the distinction drawn in the commentary between a legal and a material injury: it notes that "in many instances of human rights violations the material injury will be to nationals of the State committing the internationally wrongful act", so that "limitation of consideration of the effects of [the] act to the legal injury suffered by an injured State [might] be too restrictive". In such cases, "the classic understanding of proportionality in the context of countermeasures as a relationship between a wrongdoing and a wronged State may be inappropriate".[602] Secondly, in discussions in the Sixth Committee of the General Assembly, it was suggested that "consideration should be given to the issue of State responsibility in the case of reprisals out of proportion to the original breach".[603]

(d) Article 50 (Prohibited countermeasures)

311. Article 50 specifies five categories of conduct which are prohibited as countermeasures. It provides:

"An injured State shall not resort by way of countermeasures to:

(a) The threat or use of force as prohibited by the Charter of the United Nations;

(b) Extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act;

(c) Any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) Any conduct which derogates from basic human rights; or

(e) Any other conduct in contravention of a peremptory norm of general international law."

312. The extensive commentary to article 50 begins by noting the overlap between subparagraph (e) and subparagraphs (a) and (d), which are justified because of the need to avoid arguments about the peremptory character of these particular norms.[604] It goes on to deal in turn with the specific exclusions:

(a) Armed reprisals or countermeasures involving a use of armed force are specifically excluded by the Friendly Relations Declaration, as well as by modern doctrine and practice;[605]

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[601] Accordingly, the United States consider that "a rule of proportionality should weigh the aims served by the countermeasure in addition to the importance of the principle implicated by the antecedent wrongful act" (ibid., p. 127).

[602] Ibid., p. 126.

[603] A/CN.4/504, p. 20, para. 74.

[604] Commentary to article 50, para. (1).

[605] Ibid., para. (2), citing General Assembly resolution 2625 (XXV) of 24 October 1970, principle one, para. 6.

(b) The commentary goes into more detail in justifying the exclusion of "extreme economic or political measures [which] may have consequences as serious as those arising from the use of armed force".[606] The problem here, however, is that countermeasures are by definition coercive: they are taken in order to induce a State to do something it is obliged but unwilling to do. To the extent that certain extreme measures are excluded by the United Nations Charter, they cannot of course be legitimized by the Draft articles: to the extent they are not (and provided they meet the other requirements of the Draft articles, especially proportionality), their *point* is to be coercive. The commentary attempts to address the point. It notes that "if formulated too broadly, subparagraph (b) might amount to a quasi-prohibition of countermeasures", but argues that article 50 limits "prohibited conduct to 'extreme economic or political coercion'"; moreover, "the term 'designed'... connotes a hostile or punitive intent and excludes conduct capable of remotely and unintentionally endangering the territorial integrity or political independence of the State";[607]

(c) As to diplomatic inviolability, the commentary notes that this is confined to "those rules of diplomatic law which are designed to guarantee the physical safety and inviolability of diplomatic agents, premises, archives and documents in all circumstances, including armed conflict".[608] This protection is of particular importance where the two States are at loggerheads, as may well be the case when countermeasures are threatened or taken;

(d) As to the prohibition of countermeasures affecting basic human rights, the commentary notes that this has its historical origin in the prohibition of reprisals against persons protected by international humanitarian law, and was extended subsequently to cover the protections afforded individuals by non-derogable norms of human rights. The problem here, however, is that countermeasures against a State by definition cannot permit the violation of non-derogable human rights, the beneficiaries of which are by definition third parties in relation to the target State, even if they are its nationals. Rather the question is that of "inhumane consequences [which are] the indirect result of measures aimed at the wrongdoing State".[609] The commentary cites instances of boycotts and other measures which exempt "articles intended to relieve human suffering" or activities "intended for humanitarian assistance".[610] Again the difficulty is that such exemptions do not necessarily involve conduct by the injured State which is legally required of it under human rights norms: however consistent with humanitarian considerations such exemptions may be, a State is not in general obliged by human rights law to allow humanitarian activities to be carried out by its nationals or officials on the territory of another State. A more persuasive justification for sub-paragraph (d) is the point that countermeasures are "essentially a matter between the States concerned" and that such measures should "have minimal effects on private parties in order to avoid collective punishment";[611]

(e) Finally, as to the residual exclusion of conduct derogating from other peremptory norms, the commentary attempts no examples: indeed it notes that subparagraph (e) "may not be strictly necessary since, by definition, *jus cogens* rules

[606] Commentary to article 50, para. (5).
[607] Ibid., para. (12).
[608] Ibid., para. (14).
[609] Ibid., para. (20).
[610] Ibid., para. (21).
[611] Ibid., para. (22).

may not be departed from by way of countermeasures or otherwise". The reference to peremptory norms will, however "ensure the gradual adjustment of the articles in accordance with the evolution of the law in this area and would therefore serve a useful purpose".[612]

313. Those Governments commenting on article 50 appear rather divided as to its general purpose and content. On the one hand, some (the Czech Republic and Ireland for example) stress that "the interests of the international community require[] that certain categories of countermeasures be prohibited,"[613] and they accordingly support the enumerated prohibitions, "most of which relate to *jus cogens*".[614] Even though it is not in agreement with some specific elements of the list, Ireland notes in particular that there has been in the last few decades "increasing recognition that there is conduct on the part of a State which should be prohibited under all circumstances and which logically therefore should not be permitted even in response to a prior unlawful act of another State".[615] Some Governments, on the other hand, are of the view that article 50 does not generally reflect State practice or customary international law.[616] Among others, Singapore criticizes article 50 for not addressing "the key issue of whether the measures taken should be related or have some nexus to the right infringed".[617] The United States finds it "unnecessary" to the extent that the rule of proportionality in article 49 would generally "limit the range of permissible countermeasures and would, in most circumstances, preclude resort to the measures enumerated in article 50."[618] It is also concerned that this provision "may add layers of substantive rules to existing regimes without clarifying either the specific rules or the law of State responsibility", taking as an example the rules on diplomatic and consular relations.[619]

314. Subparagraph (a) has not been subject to many comments by Governments, although France finds that its drafting is "strange" and suggests a formulation based on article 52 of the Vienna Convention on the Law of Treaties.[620] Recalling that, according to General Assembly resolution 2625 (XXV), States have a duty to refrain from acts of reprisals involving the use of force, Ireland "fully agrees with the limitation on countermeasures specified in this subparagraph", which "implicitly recognizes the role of the United Nations and its organs in this area".[621]

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[612] Ibid., para. (26).

[613] A/CN.4/496, p. 18, para. 121.

[614] Czech Republic (A/CN.4/488, p. 128). Similarly, Ireland "strongly endorses the itemization in draft article 50 of substantive limits to the measures which may lawfully be taken by way of countermeasures"; ibid. Denmark, on behalf of the Nordic countries, would retain a provision on prohibited countermeasures "along the lines of article 50", ibid.

[615] Ibid.

[616] United States, adding that it "may serve to magnify rather than resolve disputes", ibid.; see also Singapore (A/CN.4/488/Add.3, p. 5, para. 13) and A/CN.4/496, p. 18, para. 120.

[617] A/CN.4/488/Add.3, p. 5, para. 13; see also United States (A/CN.4/488, p. 128).

[618] Ibid.

[619] Ibid.; the United Kingdom asserts that the limitations set in article 50 "are not satisfactory"; ibid.

[620] Ibid., p. 129; the provision would read as follows: "the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations".

[621] Ibid.; see also A/CN.4/504, p. 20, para. 74, where it is stressed that "armed countermeasures [are] prohibited under Article 2, paragraph 4, of the Charter of the United Nations, which [has] become a customary rule of international law".

315. Opinions as to subparagraph (b), by contrast, are divided. Among its supporters are, at least implicitly, those States which are generally critical of the use of countermeasures, on the ground that they "favour more powerful States and [...] potentially undermine any system based on equality and justice".[622] As Singapore puts its, "[a]n economically or politically more powerful State is bound to be in a better position to impose effective countermeasures than weaker States, especially developing and less developed States. Similarly, the impact of countermeasures against weaker States will generally be far more detrimental than for more powerful States."[623] On the other hand, some Governments are very much opposed to the subparagraph. France considers that it has no basis in customary law and should be deleted.[624] Japan fears that it "would prohibit virtually all countermeasures".[625] The United Kingdom and the United States both criticize its vague and subjective language,[626] the United Kingdom Government adding that "if the original wrong were the application of 'extreme economic or political coercion' to the injured State, it is hard to see why that State should not respond in kind against the wrongdoing State".[627] Ireland and Switzerland are more supportive of the subparagraph. For the Irish Government, there is some State practice supporting it, although doubts remain as to "whether there would be universal agreement that such conduct is prohibited *in all circumstances*": the provision accordingly is *lex ferenda*.[628] Moreover, it considers that "some such limitation on the taking of countermeasures is desirable", even if the term "extreme" lacks precision. In its view the problem might be addressed by focusing on the protection of "the vital interests of the population of a wrongdoing State as opposed to the vital interests of the State itself": in particular, in its view, countermeasures should not have the result of "depriving the people of a State of their means of subsistence".[629] In a similar vein, Switzerland wonders why the prohibition of subparagraph (b) is not extended to "other types of coercion, for example environmental countermeasures", and suggests deleting the words "economic or political".[630]

316. Few comments have been made as to subparagraph (c). Ireland again considers it as *de lege ferenda*, to the extent that the inviolability of diplomatic and consular agents, premises, archives and documents may not exist "*in all circumstances*": however, it clearly supports the provision, noting that "[t]here are other measures which may lawfully be taken as a response to an internationally wrongful act in relation to diplomatic and consular personnel and property and which would not be as deleterious to the functioning of the international legal system, for example a rupture of the diplomatic relations between the wronged and the wrongdoing

[622] Singapore (A/CN.4/488/Add.3, p. 6, para. 15); see also A/CN.4/496, p. 18, para. 120 and Argentina (A/CN.4/488/Add.1, p. 7).

[623] A/CN.4/488/Add.3, p. 6, para. 15.

[624] A/CN.4/488, p. 129.

[625] A/CN.4/492, p. 16.

[626] A/CN.4/488, p. 130; for the United Kingdom, "there is in any case no obvious way in which a definition of 'extreme' measures might be approached".

[627] Ibid.

[628] Ibid., p. 129 (italics in the original).

[629] Ibid., p. 130; see also Singapore, referring to the "ironic" suffering possibly caused by a countermeasure to a population "already suffering from a repressive regime" (A/CN.4/488/Add.3, p. 6, para. 16).

[630] A/CN.4/488, p. 130.

State".[631] The United States is likewise "strongly", in favour of subparagraph (c) which, however, "should not be misinterpreted to preclude actions taken on the basis of reciprocity".[632]

317. Subparagraph (d) raises a similar debate as subparagraph (b). For some States, its language, especially the phrase "basic human rights", is not "clearly defined",[633] and is likely to create problems as "there are very few areas of consensus, if any, as to what constitutes "basic human rights".[634] The United Kingdom finds it also "difficult to grasp and unacceptably wide", even though it "strikes a sympathetic chord". Noting that "most countermeasures are not directed at individuals, but are measures taken by one State against another State", the British Government wonders "how any recognizable countermeasure in the understood sense of the term could amount to 'conduct which derogates from' fundamental rights", or even from "other generally recognized human rights". In its opinion, subparagraph (d) raises issues of substantive law and this confirms that no "detailed regulation" of countermeasures should be attempted in the draft articles.[635] Ireland, on the other hand, "agrees with the general thrust of the limitation" for basic human rights. Like the other Governments, it considers the phrase "basic human rights" is "too general and imprecise", but believes it "possible to identify certain such rights from which no derogation is permissible", even in time of war or other public emergency. The Irish Government refers in that regard to the "large degree of concordance" existing among various human rights treaties as to the list of non-derogable rights.[636] Relying in particular on article 4 of the International Covenant on Civil and Political Rights, it suggests that the list there laid down be included in draft article 50. Accordingly, it recommends that "countermeasures involving a derogation from any of the rights specified in paragraph 2 of article 4 of the [... Covenant ...] as well as countermeasures which are discriminatory on any of the grounds mentioned in paragraph 1 of article 4 should be expressly prohibited".[637]

318. As to subparagraph (e), Ireland suggests that it be deleted. While there is, in its view, "widespread acceptance of the concept of a peremptory norm of general international law, there is not the same degree of consensus with respect to the identification and formulation of specific norms", and the provision thus cannot be sufficiently specified.[638] The United States similarly notes that "the content of peremptory norms is difficult to determine outside the areas of genocide, slavery and torture",[639] and France also supports the deletion of the subparagraph, consistently with its current approach of the concept of *jus cogens*.[640] By contrast, it has been suggested that the Commission should "consider the measures adopted in recent

[631] Ibid., p. 131.
[632] Ibid., pp. 128-129, footnote 116.
[633] Japan, recommending the deletion of the provision, if it cannot be further clarified (A/CN.4/492, p. 16).
[634] United States (A/CN.4/488, p. 132).
[635] Ibid.; the same Government also notes that some issues dealt with in the commentary (such as the exclusion from embargoes "of items necessary for basic subsistence and humanitarian purposes") are currently subject to controversy within the Security Council and the General Assembly.
[636] Ibid., p. 131.
[637] Ibid., p. 132.
[638] Ibid., p. 133.
[639] Ibid.
[640] Ibid.

years against 'pariah' States which were guilty of violating the fundamental norms of international law".[641]

319. Finally, France, seeking to "emphasize the essentially conditional and provisional nature of countermeasures", proposes adding a new article 50 *bis* on the cessation of countermeasures, which would read as follows:

> "Countermeasures shall cease as soon as the obligations breached have been performed and full reparation has been obtained by the injured State."[642]

3. Recasting the provisions on countermeasures by an injured State

320. Against this background, five basic issues can be identified, as follows:

(a) The definition of countermeasures;

(b) Obligations not subject to the regime of countermeasures;

(c) Conditions for taking and maintaining countermeasures;

(d) The termination of countermeasures;

(e) The formulation of article 30.

These will be considered in turn.

(a) Definition of countermeasures

321. Article 47, as noted already, is a hybrid provision "defining" countermeasures taken by an injured State and specifying the limitation that countermeasures may not affect the rights of third States.[643] It has attracted a significant number of comments and proposals from Governments. Underlying these is a concern as to the dual character of the draft articles on countermeasures. Their inclusion in Part Two (or Part Two *bis*) is justified because countermeasures are a means — sometimes the only means — of inducing a responsible State to comply with its obligations of cessation and reparation and are, to that extent, allowed by international law. But their focus is on the regulation of countermeasures, and this corresponds to the focus of much governmental concern, viz., the possible abuse of countermeasures. The inelegance of the "definition" of countermeasures in article 47 arises because the Commission was not prepared to say, in so many words, that countermeasures which meet the specified conditions are a lawful (or "legitimate") response to the breach of an international obligation. It is entirely proper to seek to prevent the abuse of countermeasures, but this is a necessary by-product of their inclusion here, not its *raison d'être*.

322. Paradoxically, some of the concerns as to the breadth of permitted countermeasures and as to the hybrid character of article 47 could be addressed by a more forthright formulation. The essential point is that countermeasures, which are by definition measures otherwise in breach of the obligations of the injured State to the responsible State, are only legitimate or permitted in the relations between those two States, i.e. in a relative sense.[644] If it says this at all, article 47 says it only

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[641] A/CN.4/496, p. 18, para. 121.

[642] A/CN.4/488, p. 133.

[643] See above, paras. 271-275.

[644] In the words of the Court in the *Gabčíkovo-Nagymaros* case, countermeasures must be "directed

implicitly, and the references in article 47 (3) to breaches of obligations to third States, and in article 50 (d) to breaches of human rights, further tend to obscure the point. Rather than a purported definition, article 47 would be better expressed as a statement of the entitlement of an injured State to take countermeasures against a responsible State for the purpose and under the conditions specified in the relevant articles.[645]

323. But there are still problems in the underlying conception of countermeasures. Two in particular need to be mentioned. The first is the relationship between non-compliance with an obligation and the suspension of that obligation. The second is the question of the essential scope of countermeasures: should they be (as article 47 apparently implies) at large, or should they be limited in some way — either by reference to "reciprocal" countermeasures (taken in relation to the same or a closely related obligation) or at least by reference to some criterion of reversibility.

Countermeasures and suspension of obligations, especially treaty obligations

324. Difficulty has sometimes arisen because of (perhaps understandable) confusion between the taking of countermeasures otherwise in breach of an international obligation and the suspension of an obligation. Commentators have stressed the significant constraints on the suspension of treaties under the Vienna Convention, and have asked how these can be seemingly evaded by reliance on countermeasures.[646] By implication, the taking of countermeasures is seen as equivalent to the suspension of an obligation. The International Court seems to have given credence to this position in the *Case concerning the Gabčikovo-Nagymaros Project*, when it said that:

> "The Court cannot accept Hungary's argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself or then reject that Treaty. The conduct of Hungary at that time can only be interpreted as an expression of its unwillingness to comply with at least some of the provisions of the Treaty and the Protocol of 6 February 1989, as specified in the Joint Contractual Plan. The effect of Hungary's conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as 'single and indivisible'."[647]

It is clear that Hungary indicated its unwillingness to comply with some of the provisions of the Treaty from 1989, through the suspension of works required by the Treaty; it is also clear that, once the reasons given by Hungary for its action were

against" the responsible State: *ICJ Reports 1997*, p. 7, at p. 55 (para. 83).

[645] Correspondingly, the question of the effect on third States can be dealt with in the context of article 50. The very definition of countermeasures excludes measures targeted at third States. The problem is rather one of the *consequences* of countermeasures on third States. See below, paras. 348 and 349.

[646] Thus a treaty can only be suspended in whole or in part for "material" breach, but the cardinal requirement for taking countermeasures is proportionality, not materiality: see e.g. D. W. Greig, "Reciprocity, Proportionality and the Law of Treaties" (1994) 34 *Virginia J.I.L.* 295 at p. 395, who treats suspension of treaties as a "remedy" and argues that the limitations in arts. 42 (2) and 60 of the Vienna Convention are rendered a "dead letter" if one allows countermeasures for non-material breaches.

[647] *ICJ Reports* 1997, p. 7, at p. 39 (para. 48).

held to be legally insufficient, this refusal entailed its responsibility for breach of those very provisions. It may also be that in substance what Hungary sought to do in 1989-90 (though it never said so in terms) was to suspend those parts of the Treaty of which it disapproved. But it is clear that there is a legal difference between the suspension of a treaty and the refusal (whether or not justified) to comply with a treaty. The suspension of a treaty (or of a severable part of a treaty), if it is legally justified, places the treaty in a sort of limbo; it ceases to constitute an applicable legal standard for the parties while it is suspended and until action is taken to bring it back into operation.[648] By contrast conduct inconsistent with the terms of a treaty in force, if it is justified as a countermeasure, does not have the effect of suspending the treaty; the treaty continues to apply and the party taking countermeasures must continue to justify its non-compliance by reference to the criteria for taking countermeasures (necessity, proportionality, etc.) for as long as its non-compliance lasts. Countermeasures are no more a ground for the suspension of a treaty than is necessity.[649]

325. There is thus clear distinction between action taken within the framework of the law of treaties (as codified in the Vienna Convention), and conduct raising questions of State responsibility (which are excluded from the Vienna Convention). The law of treaties is concerned essentially with the content of primary rules and with the validity of attempts to alter them; the law of responsibility takes as given the existence of the primary rules (whether based on a treaty or otherwise) and is concerned with the question whether conduct inconsistent with those rules can be excused and, if not, what the consequences of such conduct are. Thus it is coherent to apply Vienna Convention rules as to the materiality of breach and the severability of provisions of a treaty in dealing with issues of suspension, and the rules proposed in the Draft articles as to proportionality etc, in dealing with countermeasures.

Scope of countermeasures

326. According to article 47, countermeasures "means that an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act". It is true that the draft articles go on to limit countermeasures in a variety of ways: (a) by the requirement that the taking of countermeasures be "necessary" to ensure compliance with the secondary obligations of cessation and reparation; (b) by imposing certain substantive and procedural conditions on the taking and continuation of countermeasures, in particular proportionality, and (c) by excluding certain measures entirely (especially those involving the use of force or the violation of basic human rights). Even so, article 47 embodies an extremely broad formulation of countermeasures. A State which confiscates the property of another State, or destroys its embassy, "does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act". Yet it seems difficult to justify such measures as instrumental in ensuring compliance with the secondary obligations of the target State.

[648] See Vienna Convention on the Law of Treaties, 1969, article 72. The Convention does not say how a suspended treaty is to be revived, i.e. whether by consent of the parties or by unilateral act of the suspending State, and if the latter, in what circumstances. Cf. however art. 72 (2).

[649] As the Court affirmed: *ICJ Reports*, 1997, p. 7 at p. 63 (para. 101).

327. One way of limiting the breadth of countermeasures, initially proposed by Special Rapporteur Riphagen, is the notion of "reciprocal countermeasures".[650] Such countermeasures involved suspension of performance of obligations towards the responsible State "if such obligations correspond to, or are directly connected with, the obligation breached".[651]

328. The notion of reciprocal countermeasures has a certain visceral appeal, associated with the instinct of "tit for tat" retaliation, and the idea that a State can hardly complain, if it has done something to another State, that the very same thing should be done to it, or the very same obligation breached. But there are serious objections to the notion of reciprocal countermeasures as a limiting condition for taking countermeasures.[652] These may be briefly summarized. First, reciprocal countermeasures evidently require that the injured State be in a position to impose the same or related measures as the responsible State, and whether this is so is essentially a matter of chance. For example, State A may not be able to sequester the assets of State B on its territory (in response to the seizure of its assets by State B) if State B has no assets there. Secondly, the notion of reciprocal countermeasures assumes that international obligations are reciprocal, but this is not necessarily true: for example, the obligation may be a unilateral one, or State A may already have irrevocably performed its side of the bargain. Thirdly, considerations of good order and humanity preclude many measures, whether or not one is the victim of similar action: if State A arbitrarily expels all the nationals of State B from its territory, this cannot justify State B doing the same. The notion of reciprocal countermeasures (adopted as a limitation on the right to take countermeasures) would place a premium on outrages by the responsible State, to which the injured State was not prepared to descend.

329. This conclusion (reached by the Commission on first reading) does not, however, end the matter. Countermeasures are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation, as for example in the *Air Services Arbitration*.[653] Where a State steps outside the immediate context of a dispute, whether it involves air services or port access for another State, and imposes unrelated measures in some other field, the dispute may well be exacerbated rather than resolved. There is something to be said for a presumption in favour of reciprocal countermeasures — which could be expressed, for example, by a provision that, where reciprocal countermeasures are reasonably available, any measures taken with respect to unrelated obligations would be presumed not to be proportionate. But there would be difficulties in assessing what amounted to "reasonable availability" for this purpose, and on balance, the Special Rapporteur believes that the link between reciprocity and proportionality can sufficiently be drawn out in the commentary.

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[650] See A/CN.4/498/Add.4, 19 July 1999, paras. 323, 359, 383.

[651] *Yearbook ... 1985*, vol. II, part 1, p. 10 (article 8). Riphagen also allowed for "reprisals", involving suspension of performance of other unrelated obligations, but subject to a (loosely formulated) condition of reciprocity: ibid., p. 11 (article 9).

[652] See commentary to article 47, para. (1).

[653] *UNRIAA*, vol. 18, p. 417 (1978).

330. This leaves open the question whether some further limitation should not be imposed on the scope of countermeasures, even if they are not to be strictly reciprocal. In the *Gabčíkovo-Nagymaros* case, the Court asserted that a countermeasure must be "reversible". After concluding that "the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate", the Court said:

> "It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible."[654]

The problem here is that, whereas a measure may be reversible (assets can be unfrozen, civil aviation can be resumed) its effects while it was in force will rarely be entirely reversible, since consequential losses will have been suffered, by the target State and by third parties. For example the airline affected by the suspension of an air services agreement will have lost revenue (indeed it may have been driven from the brink of insolvency into actual liquidation). Yet it has never been suggested that a State successfully taking countermeasures should be required to compensate all those who may have suffered consequential loss, and to require this would effectively preclude countermeasures in many cases.[655]

331. But the notion of reversibility can nonetheless stand. The point about countermeasures is that they are instrumental; they are taken with a view to achieving a particular result (compliance by the target State with its international obligations of cessation and reparation), and they are justified only insofar as they continue to be necessary to that end. Irrevocable damage done to the target State in breach of an international obligation of the State taking countermeasures would amount to punishment or a sanction for non-compliance, not a countermeasure as conceived in the Draft articles. The difficulty is how to convey that idea. Rather than using the language of reversibility, it seems sufficient for this purpose that Article 47 (2) define countermeasures as conduct involving the suspension of performance of an obligation to the target State.[656] This will clearly entail that the countermeasure not be such as to preclude the resumption of performance, and the commentaries can spell out this requirement in more detail.

Other aspects of article 47

332. Other aspects of the formulation of article 47 are less controversial. It is evident that countermeasures may only be taken subject to the conditions and restrictions set out in the following articles. No doubt this needs to be said, but it does not need a separate paragraph to say it. It is also clear that under the Draft articles, countermeasures are intended to have an instrumental, not a punitive purpose. They can only be taken in order to induce the responsible State to comply with its obligations of cessation and reparation. Correspondingly, it is necessary

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[654] *ICJ Reports* 1997, p. 7, at p. 57 (para. 87).

[655] There is of course a distinction between those whose rights vis-à-vis the injured State are impaired by a countermeasure, and those who are indirectly affected by such a measure. A trade embargo against State B may well affect third parties trading in or with State B; this is quite different from a trade embargo directed against those third parties as such.

[656] In this respect the Special Rapporteur proposes to revert to the language of Mr. Riphagen in his Sixth Report: *Yearbook ... 1985*, vol. II, part 1, pp. 10-11.

before countermeasures are taken that the injured State should have called on the responsible State to comply, and that it should have failed or refused to do so.[657] The circumstance of necessity justifying countermeasures arises, not because of the breach as such but because of the subsequent failure to comply with these obligations. Obviously for this failure to be established, the responsible State must first have been called on to comply.

333. The Special Rapporteur proposes below a version of article 47 in line with these conclusions.[658]

(b) Obligations not subject to the regime of countermeasures

334. As it stands, article 50 (prohibited countermeasures) combines a number of quite different prohibitions.[659] Some subparagraphs are directed at excluding certain forms of countermeasure altogether (subparagraphs (a), (c) and (e)). One at least (subparagraph (b)) is directed at the effect of countermeasures, providing that they may not involve certain forms of "extreme ... coercion". One (sub-paragraph (d), excluding derogations from "basic human rights") is inspired by certain well-established prohibitions of reprisals in the field of international humanitarian law, but also raises the separate question whether the effect of countermeasures in indirectly impairing basic human rights should not be addressed. It seems better and clearer, however, to distinguish between obligations which may not be suspended by way of countermeasures, and obligations which must be respected in the course of taking countermeasures — in other words, between the subject of countermeasures and their effect. Article 50 might usefully be divided into two: an article (in relation with article 47) which addresses the former question, and another which addresses the latter.

Forcible countermeasures

335. Turning to the subject of countermeasures, the first and uncontroversial exclusion is forcible countermeasures (existing article 50 (a)). The rules relating to the use of force by States in international relations are those primary rules contained in or referred to by the Charter, together, perhaps, with certain other rules sustained by generally accepted international practice. To the extent that these rules are contained in the Charter, they are given effective paramountcy by article 103; in any event there is a broadly held view that if any rules of international law have the status of peremptory norms it is these. In terms of the distinction between primary and secondary obligations these rules are primary; it is not the function of the Draft articles to qualify or extend them by the development of secondary rules, even if that were possible.[660] But there is, in any event, no basis in modern international law for countermeasures involving the use of force as prohibited by the Charter.

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[657] As the Court affirmed in the *Gabčíkovo-Nagymaros* case, *ICJ Reports* 1997, p. 7, at p. 56 (para. 84), affirming that "the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it".

[658] See below, para. 367.

[659] For the text of and comments on article 50 see above, paras. 289-297.

[660] This includes, to the extent that they may still be recognized in international law, the rules relating to belligerent reprisals, which are primary rules relating to permissible conduct in armed conflict, not secondary rules of responsibility.

336. The only question then is the formulation of paragraph (a). France proposes a new formulation based on article 52 of the Vienna Convention;[661] this is an improvement, but some further adjustment is required to take into account the proposed conception of article 50, viz. that it excludes certain obligations, *a priori*, as possible subjects of countermeasures. Accordingly article 50 (a) should exclude from the regime of countermeasures "the obligations as to the threat or use of force embodied in the Charter of the United Nations".

Minimum obligations necessary to maintain diplomatic and consular inviolability

337. A second exclusion, contained in paragraph (c), deals with "conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents". By contrast with paragraph (a) the concern here is a functional one. It is not that diplomatic and consular inviolability are peremptory or non-derogable norms. Rather paragraph (c) seeks to maintain the basic level of diplomatic communication between the two States at a time when, by definition, relations between them are likely to be strained. It also seeks to avoid the situation where diplomatic personnel and premises become, in effect, permanent potential hostages as targets for countermeasures. In this context, the remarks of the International Court in the *Diplomatic and Consular Personnel* case are significant. The Court noted that even alleged criminal activities of the United States against Iran would not have justified breaches of diplomatic and consular inviolability: "diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions."[662] It went on to refer to the rules of diplomatic law as a "self-contained regime" and to "the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions [as] one of the very foundations of this long-established regime".[663] Evidently the Court did not contemplate that a breach of some other international obligation could constitute a justification or excuse for a breach of inviolability.

338. It may be noted that no Government has proposed the deletion of paragraph (c).[664] It is true that, as one Government commented, such inviolability may not exist "in all circumstances"; but it should be explained in the commentary that what is preserved is precisely the obligation to respect inviolability as it exists between the two States in accordance with the applicable rules of international law. That is, of course, entirely without prejudice to the rights of the receiving State under those rules (e.g. to terminate the mission, to declare personnel *persona non grata*, to impose reciprocal restraints on freedom of movement, etc.). Another State, by inference at least, raised the question whether the inviolability or diplomatic and consular premises and personnel might be subject to reciprocal countermeasures: in other words, whether State B's seizure of the diplomatic personnel or premises of State A could justify State A in similarly detaining the personnel or premises of State B.[665] But there appears to be no modern case where infringements of diplomatic or consular inviolability (as distinct from other privileges) has been

[661] See above, para. 314.

[662] *ICJ Reports* 1980 p. 3, at p. 38 (para. 83), referring, *inter alia*, to article 9 of the 1961 Vienna Convention.

[663] Ibid., p. 566 (para. 86).

[664] See above, para. 294.

[665] See above, para. 294, for the comment of the United States to that effect; and for discussion of reciprocal countermeasures see above, paras. 327-329.

justified as a countermeasure, and — quite apart from the categorical language of the International Court, already quoted — it does not seem desirable to institute such a system exclusively for the purposes of paragraph (c). That paragraph should be maintained as it stands.

Obligations in the field of dispute settlement

339. Another functional necessity in times of conflict between States is to maintain in operation all existing provisions for dispute settlement. As the International Court noted in the *Diplomatic and Consular Personnel* case in relation to a bilateral treaty of amity, "any alleged violation of the Treaty by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes".[666] Although not included in article 50, this is implicit in article 48 (2), which requires the injured State to comply with "any dispute settlement procedure" in force between it and the target State. However it is desirable to say explicitly in article 50 that an obligation relating to dispute settlement may not be suspended as a countermeasure.

Obligations under human rights and humanitarian law

340. Paragraph (d) exempts from the scope of countermeasures "any conduct which derogates from basic human rights". As one Government noted,[667] this raises a difficulty, since human rights obligations are not, in the first instance at least, owed to particular States, and it is accordingly difficult to see how a human rights obligation could itself be the subject of legitimate countermeasures. Of course it is possible that State A, in the course of taking countermeasures against State B (e.g., by freezing assets of State B in its territory) might violate the human rights of some individual, whether or not a national of State B. But it is obvious from the proposed formulation of article 47 that the lawfulness or legitimacy of the conduct vis-à-vis State B does not entail that it is lawful vis-à-vis third parties, including individuals. In any event, the measure itself would not be prohibited in such a case, merely its effects vis-à-vis the third party.[668] A reservation for "basic" human rights may be necessary in the proposed article 48, dealing with the conditions for taking countermeasures, but it is out of place in article 50.

341. There may however be a need to reflect in article 50 the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the 1929 and 1949 Conventions and the First Protocol of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.[669] It is clear that where applicable rules of

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[666] *ICJ Reports* 1980 p. 3, at p. 28 (para. 53). This is the counterpart in the field of countermeasures of the principle of the autonomy of arbitration clauses. See, for example, Vienna Convention on the Law of Treaties, article 65 (4), and S. M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge, Grotius Publications, 1987), Part I.

[667] See above, para. 295.

[668] As the Tribunal pointed out in the *Cysne* case, "reprisals are not admissible except against the wrongdoing State. It may be, admittedly, that legitimate reprisals, carried out against an offending State, affect those belonging to an innocent third State. But that is only an indirect and involuntary consequence, which the injured State will seek, in practice, always to avoid or to limit as far as possible." *UNRIAA*, vol. II, p. 1052 (1930) at p. 1057.

[669] See K. J. Partsch, "Reprisals", *Encyclopedia of Public International Law* (North Holland, Amsterdam, 1986) vol. 2, p. 330 at pp. 333-334; S. Oeter, "Methods and Means of Combat" in

general international law or multilateral treaties prohibit certain conduct by way of reprisals, the relevant obligations cannot themselves be suspended in any circumstances, including by way of countermeasures, reciprocal or other.[670] A provision, modelled on article 60 (5) of the Vienna Convention, does have a place in the draft articles. The broader issue of countermeasures whose effect is to impair fundamental human rights will be considered below.[671]

Obligations under other peremptory norms

342. Finally, paragraph (e) prohibits as countermeasures "any other conduct in contravention of a peremptory norm of general international law". It is obvious that a peremptory norm, not subject to derogation as between two States even by treaty, cannot be derogated from by unilateral action in the form of countermeasures. Nonetheless a number of Governments have expressed concern at saying so, either because of their general position with respect to peremptory norms, or out of concern for the lack of specification of the category.[672] The real difficulty, however, is in identifying existing peremptory norms whose application is not already excluded either by the conception of countermeasures itself, or by other specific exclusions. For example such matters as the prohibitions of genocide, slavery and torture are evidently excluded (both by the basic conception of countermeasures against a State and by the proposed equivalent of article 50 (d) dealing with basic human rights[673]). Forcible countermeasures are excluded by paragraph (a), on the basis that the rules relating to the use of force in international relations (widely regarded as non-derogable) govern the matter.[674] There is thus a case for the deletion of paragraph (e) as unnecessary. On the other hand, new peremptory norms may come to be recognized, and if the international community as a whole comes to regard a particular rule as one from which no derogation may be permitted in any circumstances, it should follow that countermeasures derogating from that rule are prohibited. For these reasons, paragraph (e) should be retained.

343. Indeed there is a case for extending paragraph (e) to other rules of international law in force between the injured State and the target State which are agreed to be non-derogable, whether or not they are regarded as peremptory under general international law. On the other hand the standard example of a non-derogable norm occurs in the field of the regional human rights conventions, and issues of the effect of countermeasures on human rights are dealt with in other ways. Moreover the non-existence of a derogation clause in a multilateral treaty is not an indication that derogations may be freely made; indeed they can only be made in the presence of such a clause. No doubt a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject

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D. Fleck (eds.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford, Oxford University Press, 1995) at pp. 475-479, with references to relevant provisions.

[670] See article 60 (5) of the Vienna Convention on the Law of Treaties, which precludes a State from suspending or terminating for material breach any treaty provision "relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties". Paragraph (5) was added at the Vienna Conference on a vote of 88-0-7. It is repeated unchanged in the counterpart 1986 Convention, article 60 (5).

[671] See below, paras. 349-351.

[672] See above, paras. 318.

[673] See below, paras. 349-351.

[674] See above, para. 335.

matter. This is the case, for example, with the European Union treaties, which have their own system of enforcement.[675] Under the WTO, special permission has to be obtained for retaliatory measures, and this again would exclude any residual right to take countermeasures under general international law for breaches of the WTO and related agreements.[676] To the extent that derogation clauses or other treaty provisions (e.g. those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are "intransgressible", they may well entail an exclusion of countermeasures.[677] But this can be achieved by the *lex specialis* provision (currently article 37), and it is sufficient to note the possibility in the commentary to article 50.

(c) Conditions for taking and maintaining countermeasures

344. Article 48 as adopted on first reading deals exclusively with procedural conditions for taking and maintaining countermeasures.[678] For the reasons already given, it is necessary to consider both procedural and substantive issues under this rubric.

(i) Substantive conditions

345. Four issues need to be considered here: proportionality, effect on the rights of third States, effect on human rights, and situations of "extreme coercion". These were covered respectively by articles 49, 47 (3), 50 (d) and 50 (b) as adopted on first reading.

Proportionality

346. No one doubts that proportionality is a key constraint on the taking of countermeaures, and the retention of a separate article dealing with proportionality is widely supported.[679] The question is rather one of its formulation. It is clearly appropriate to take into account both the degree of gravity of the breach and its effects on the victim (which, however, may or may not be a State). A number of Governments proposed, however, that the requirement of proportionality be more strictly formulated, and this suggests that the present double negative formulation "not be out of proportion" needs reconsideration. In other areas of the law where proportionality is relevant, it is normal to express the requirement in positive terms, even though — in those areas as well — what is proportionate is not a matter which can be determined precisely.[680] The International Court in the *Case concerning the*

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[675] On the exclusion of unilateral countermeasures in EU law, see, for example, Cases 90 and 91/63, *Commission v. Luxembourg & Belgium* [1964] ECR 625 at p. 631; Case 52/75, *Commission v. Italy* [1976] ECR 277 at p. 284; Case 232/78, *Commission v. France* [1979] ECR 2792.

[676] See article 3 (7) of the Dispute Settlement Understanding, and for an example of such authorization see the decision of the DSB in *European Communities: Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27, 1999).

[677] To use the synonym adopted by the International Court in *Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996*, p. 226, at p. 257 (para. 79).

[678] See above, paras. 276-283.

[679] See the summary of Government comments above, paras. 308-309.

[680] This was the reason why the Arbitral Tribunal in the *Air Services Arbitration* adopted the negative formulation: *UNRIAA*, vol. 18, p. 417 (1978) at p. 444 (para. 83). But they were of course dealing with a reciprocal countermeasure, in the same field of air services as the French restriction to which it was a response. Special Rapporteur Riphagen did not expressly apply the proportionality test to reciprocal countermeasures, though he did observe that "elements of

Gabčíkovo-Nagymaros Project said that countermeasures must be "commensurate with the injury suffered, taking account of the rights in question".[681] That positive formulation seems clearly preferable. The question is whether it is also useful to introduce into article 49 the notion of purpose, i.e. to require that the proportionality of countermeasures be tested by asking whether they are "tailored to induce the wrongdoer to meet its obligations under international law".[682] That is indeed a requirement, but it is an aspect of the test of necessity formulated in article 47. Proportionality is no doubt linked to necessity, in that a clearly disproportionate measure may well be judged not to have been necessary either. But it is also a limitation even on measures which are necessary in the sense that, without them, the target State is unlikely to comply. In every case a countermeasure must be proportionate to the injury suffered, and this has a function partly independent of the question whether the countermeasure was necessary to achieve a particular result. Accordingly the Special Rapporteur proposes that countermeasures be "commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and its effects" on the injured party.

Effect on third States

347. Article 47 (3) makes it clear that countermeasures only justify a breach of international law vis-à-vis the responsible State. Indeed this follows from the relative and conditional effect of countermeasures, specified already in article 47 (1); it should also follow from the statement of countermeasures as circumstances precluding wrongfulness in article 30 of Part One. Governments have not cast any doubt upon the proposition, though some questioned the placement of paragraph (3) in article 47, and one at least suggested it should be more broadly formulated.[683] The Special Rapporteur, for his part, rather doubts the value of a separate provision: since it is already clear that countermeasures only allow the suspension of performance of an obligation as between the injured State (or, perhaps, some other State or States acting on its behalf) and the responsible State, there is strictly speaking no need to refer to the position of third States. By definition their rights (i.e. the performance of obligations by the injured State which are owed to them) are unimpaired. This does not mean that third States may not be affected as a consequence of countermeasures. Countermeasures (e.g., in the form of an interruption of trading links, assuming that such an interruption constitutes a breach of international law vis-à-vis the target State[684]) may have indirect or consequential effects on third States, but that is another matter. Indeed it can be argued that a separate limitation so far as the rights of third States are concerned is not only unnecessary but that it is undesirable, since it raises, *a contrario*, an impression that countermeasures operate objectively, i.e., as against the world — which is not the case.[685]

'proportionality' and 'interm protection' are inherent in measures by way of reciprocity": *Yearbook ... 1985*, vol. II, part one, p. 11. He adopted a "manifestly disproportional" test for non-reciprocal countermeasures or reprisals as he called them; ibid.

[681] *ICJ Reports 1997*, p. 7 at p. 56 (para. 85).

[682] See above, para. 306.

[683] See above, paras. 296-297.

[684] See above, para. 322. On the extent to which economic boycotts may breach international law, see, for example, S. C. Neff, "Boycott and the Law of Nations" (1988) 59 *B.Y.I.L.* 113.

[685] It is useful to contrast countermeasures with measures taken in the exercise of belligerent rights. There is a complex body of rules relating to the position of third parties in armed conflict; they

348. The relative and limited effect of countermeasures, which preclude wrongfulness only vis-à-vis the responsible State, should be clearly expressed in articles 30 and 47 (1). If this is done, then strictly speaking the issue whether countermeasures justify breaches of obligations to third States cannot arise. However there is a point to the Irish Government's suggestion[686] for a broader provision protecting the position of third parties; this will incidentally make it clear that countermeasures cannot justify breaches of obligations to third States.

Effect on human rights

349. The position with respect to human rights is at one level the same as the position with respect to the rights of third States. Evidently, human rights obligations are not owed to States as the primary beneficiaries, even though States are entitled to invoke those obligations and to ensure respect for them. Moreover human rights obligations have their own regime of qualifications and derogations which takes into account considerations such as national emergency. Thus it is obvious that human rights obligations (whether or not qualified as "basic" or "fundamental") may not themselves be the subject of countermeasures, in other words, that human rights obligations may not be suspended by way of countermeasures, and that conduct inconsistent with human rights obligations may not be justified or excused except to the extent provided for by the applicable regime of human rights itself. The real problem is a different one. It involves the case where measures taken against a State have consequential effects on individuals, or indeed on the population of the State as such.

350. This issue has mostly been discussed in the context of the impact on civilian populations and especially on children, of Security Council sanctions, a subject which falls outside the scope of the draft articles. It may be noted, however, that General Comment 8 (1997) of the Committee on Economic, Social and Cultural Rights covers equally the case of sanctions imposed as countermeasures by individual States or groups of States as those imposed by the Security Council. The General Comment stresses that "whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights",[687] and goes on to state that:

> "In considering sanctions, it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing élite of a country to persuade them to conform to international law, and the

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may be subject, for example, to the exercise of rights of search and seizure on the high seas, and their nationals, though they may not be targeted as such, may be the victims of weapons properly targeted at a belligerent. See, for example, L. Doswald-Beck (ed.), *San Remo Manual on International Law applicable to Armed Conflicts at Sea* (Cambridge, Cambridge University Press, 1995; D. Schindler, "Transformations in the Law of Neutrality since 1945", in A. Delissen and G. J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead* (Nijhoff, Dordrecht, 1991) p. 367; M. Bothe, "Neutrality in Naval Warfare: What is left of traditional international law?", in ibid., p. 387. There appears to be no specific equivalent to this body of rules in the field of countermeasures, since the taking of countermeasures has never given rise to a "status" under international law equivalent to the status of belligerency.

[686] See above, para. 297.

[687] United Nations document E/C.12/1997/8 dated 5 December 1997, para. 1.

collateral infliction of suffering upon the most vulnerable groups within the targeted country."[688]

Analogies can be drawn from other elements of general international law. For example, Protocol I of 1977, article 54 (1) stipulates unconditionally that "Starvation of civilians as a method of warfare is prohibited." The final sentence of article 1 (2) of the two United Nations Covenants on Human Rights states that "In no case may a people be deprived of its own means of subsistence": this provision was the basis for article 42 (3) of the draft articles adopted on first reading.[689]

351. There is thus a range of concerns as to the impact of countermeasures on human rights, and some clarification of the position seems necessary, along the lines of present article 50 (d). In order to avoid suggesting that human rights obligations as such may be suspended by way of countermeasures, the proposed provision protecting the position of third parties generally should make express reference to the human rights of affected persons.[690] Although some Governments wondered what is or is not included in referring to "basic" or "fundamental" human rights,[691] this is not a matter the draft articles can resolve one way or the other. Rather the question will be determined by having regard to the human rights obligations under treaty and general international law of the acting State.

Situations of "extreme coercion"

352. Finally reference must be made to article 50 (b), which precludes countermeasures involving "extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act". Paragraph (b) has proven controversial, giving rise to a wide range of Government comments, including proposals for its deletion or radical amendment.[692] The difficulty is that, on the one hand, there is widespread concern as to the possibility for abuse of countermeasures, while on the other hand the essence of countermeasures is that they are coercive: they are by definition measures taken to induce a State to comply with its international obligations, measures otherwise unlawful which are necessary to that end. Thus a prohibition of "extreme coercion" has to meet the objections (1) that the reference to "extreme" coercion may only mean coercion which is effective for the permitted purpose; (2) that what is "extreme" cannot be defined; (3) that in accordance with the strengthened requirement of proportionality, "extreme" measures can only properly be responses to extreme and unlawful measures on the part of the responsible State. The reference in paragraph (b) to measures "designed to endanger the territorial integrity or political independence" of the target State raises analogous questions. Arguably, a measure cannot lawfully be "designed" to endanger the territorial integrity of a State because, first of all, the use of force is excluded as a countermeasure, and secondly, the territorial integrity of a State could not, as such, be the subject of countermeasures; like territorial sovereignty, territorial integrity is a permanent attribute of the State and is not subject to measures of suspension. As to political independence, if by endangering the political independence of a State is

[688] Ibid., para. 4.
[689] See above, paras. 38-42.
[690] For the proposed provision see below, para. 367.
[691] See above, para. 317.
[692] See above, para. 315.

meant requiring that State to do something it refuses to do — i.e., comply with its international obligations — again it can be said that this is the very point of countermeasures, whereas if it means that a State's political independence in other respects cannot be endangered, the question is how countermeasures otherwise lawful under the draft articles could have that effect.

353. Then there is the problem that paragraph (b) only prohibits measures which involve "extreme" coercion and which are designed to endanger territorial integrity or political independence. This suggests that less extreme measures designed to endanger territorial integrity (e.g., counter-intervention or counter-insurgency measures) may be lawful. Thus if State A allows a secessionist or rebel group to broadcast from its territory against neighbouring State B, State B could similarly allow a rebel group seeking the dissolution of State A to broadcast. Broadcasting, even if unlawful, is not normally a form of "extreme coercion".

354. The formulation of paragraph (b) is thus deficient, and the question becomes whether some alternative formulation can be conceived to give assurances against the abuse of countermeasures, over and above the limitations included in the other articles. There is a case for the deletion of paragraph (b), but on balance the Special Rapporteur believes that the concerns it tries to address are real ones. He suggests a provision to the effect that countermeasures may not endanger the territorial integrity or amount to intervention in the domestic jurisdiction of the target State.[693] Evidently, whether that State complies with its international obligations of cessation and reparation is not a matter of its domestic jurisdiction, but countermeasures must not be taken as an excuse to intervene in other issues internal to the responsible State, distinct from the question of its compliance with its international obligations; such issues continue to be protected by the principle of domestic jurisdiction.

(ii) Procedural conditions

355. In the light of the Commission's conclusions reached in 1999 and summarized already,[694] discussion of article 48 must proceed on the basis that the draft articles will not establish an organic link between countermeasures and any specific method of dispute settlement. It is, for the time being at least, the function of the Commission to formulate provisions on countermeasures on the basis that (a) it is seeking to express, as a matter of codification and progressive development, appropriate provisions on countermeasures under general international law, and (b) under general international law, States are entitled (as well as obliged) to settle their disputes by peaceful means of their own choice. This does not mean, however, that the draft articles need make no reference to such forms of dispute settlement as may be applicable to the parties in a given case.

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[693] The Friendly Relations Declaration (General Assembly resolution 2625 (XXV) of 24 October 1970), in dealing with the principle of non-intervention, stipulates that:

> "No State ... has the right to intervene, directly or indirectly, *for any reason whatever*, in the internal or external affairs of any other State ... Every State has an *inalienable* right to choose its political, economic, social and cultural systems, without interference in any form by another State." (emphasis added)

Similar affirmations are contained in a large number of resolutions, treaties and other texts.

[694] See above, para. 265.

356. The provisions of article 48, and the vigorous debate it has aroused, have already been noted.[695] Three distinct issues are raised:

(a) The initial requirement of the notification of the dispute;

(b) The relation of the taking of countermeasures to the requirement to negotiate (and the compromise provision for "interim measures of protection");

(c) The provision for suspension of countermeasures in the event that the dispute is submitted in good faith to third party settlement.

357. As to the first, clearly a State aggrieved by a breach of international law and contemplating taking countermeasures in response to that breach should first call on the responsible State to comply with its obligations of cessation and reparation.[696] Whatever position may be taken on the formal requirements for the invocation of responsibility,[697] a State may not take countermeasures without giving the opportunity to the responsible State to respond to its complaint. This is spelt out very briefly indeed in article 47 (1) as adopted on first reading, under which the necessity for countermeasures is assessed in light of any response to the demands of the injured State. But nothing is said as to the way in which these demands should be formulated. In its redrafted version of article 48, France proposes that the injured State should "submit a reasoned request" to the responsible State calling on it to comply, notify it of the proposed countermeasures and agree to negotiate. But in the meantime (as from the date of the notification), it may "implement provisionally such countermeasures as may be necessary to preserve its rights".[698] In effect this brings together in new, more specific (and in the Special Rapporteur's view, improved) language the two elements contained in article 48 (1) adopted on first reading. But whatever position may be taken as to the second element of provisional measures, it seems desirable to require specifically that, before countermeasures are taken, the responsible State must have been called on to comply with its obligations and have failed or refused to do so. In a situation where countermeasures are or may be warranted, a relatively short time limit could be set for a response; given the variety of possible cases, however, it does not seem appropriate to set any particular time limit in article 48 itself.

358. As to the second point, there is general agreement that the parties to a dispute potentially involving countermeasures should comply with any dispute settlement procedures in force between them. Existing article 48 (2), which says this, should be retained. The question, however, is whether the obligation to negotiate over the dispute should be a prerequisite to the taking of countermeasures in any form, or at least in any other than a provisional way. In that regard, the following comments may be offered:

(a) Whether or not the criterion of "reversibility" of countermeasures is expressly adopted, the essential point of countermeasures is that they are instrumental, not punitive, and that they must be terminated in the event that the responsible State complies with its international obligations. In this sense they *always* have a temporary character;

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[695] See above, paras. 298-305.

[696] According to the International Court, this requirement already exists under general international law: see above, note 535.

[697] See above, paras. 234-238.

[698] See above, note 566, for the full text of the French proposal.

(b) The language of "interim measures of protection" adopted in article 48 (1) on first reading is unclear, and invites confusion with the provisional measures indicated or ordered by international courts and tribunals.[699] The very brief "definition" of such measures is also unsatisfactory;

(c) Even if it is poorly formulated in article 48 (1), there is a sensible distinction between measures taken immediately and provisionally in response to a breach (e.g. the temporary suspension of a licence, the temporary freezing of assets) and measures which, while still terminable, have a more definite impact (e.g., the withdrawal of a licence — which may nonetheless be reissued; the placing of assets under some form of management or administration — from which they may nonetheless be released). The draft articles should encourage more measured responses, as well as the opportunity for negotiations if these can be held without ultimate prejudice to the rights of the injured State;

(d) Although it received a degree of support during the debate on article 48 on first reading, to postpone all countermeasures until negotiations are concluded or have definitively broken down does not seem satisfactory.[700] Rather it would be a recipe for delay and prevarication.

Defective as it may be in its expression, for these reasons the Special Rapporteur believes that the essential balance struck in article 48 between notification and negotiation, on the one hand, and the capacity of the injured State to take provisional measures to protect its rights, on the other, is an appropriate one. Furthermore that balance seems to be elegantly struck by the French Government's proposal, already referred to. The Special Rapporteur proposes a provision broadly along those lines.[701]

359. The third point relates to the possible suspension of countermeasures once dispute settlement procedures have been engaged and a court or tribunal has the power to order or indicate interim measures of protection. In such a case — and for so long as the dispute settlement procedure is being implemented in good faith — unilateral action would not seem to be justified. Article 48 (3)-(4), which incorporated this principle, was not simply an invention of the Commission. It was inspired by the remarks of the Tribunal in the *Air Services Arbitration*.[702] Moreover it has been on the whole accepted by the Governments which commented on article 48.[703] In the Special Rapporteur's view, it should be retained.

360. To summarize the conclusions on the three issues identified above, it is suggested that the draft articles provide that:

(a) Before countermeasures are taken, the responsible State must have been called on to comply with its obligations and have failed or refused to do so;

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[699] See e.g., Statute of the International Court of Justice, article 41; United Nations Convention on the Law of the Sea, 1982, article 290.

[700] That view was rejected as a matter of general international law by the Tribunal in the *Air Services Arbitration*, *UNRIAA*, vol. 18, p. 417 (1978) at p. 445 (para. 91).

[701] See below, para. 367, for the proposed provision; see also note 717 for an alternative provision, not embodying any distinction between "provisional" and other measures.

[702] *UNRIAA*, vol. 18, p. 417 (1978) at pp. 445-446 (paras. 94-96).

[703] See above, para. 305. The French proposal (above, note 566) incorporates the same principle in nearly the same language.

(b) Countermeasures should not be prohibited during negotiations; rather, the distinction adopted on first reading between "provisional" and other measures should be retained, but in a clearer formulation;

(c) Countermeasures should be suspended in the event that the dispute is submitted in good faith to third party settlement, provided that the breach is not a continuing one.

(d) Termination of countermeasures

361. As noted already, France proposes a provision on the termination of countermeasures, to the effect that countermeasures must be terminated as soon as the conditions which justified taking them have ceased, i.e. "as soon as the obligations breached have been performed and full reparation has been obtained by the injured State".[704] This is clearly implied by the existing articles but could well be made express.[705] The Special Rapporteur suggests a single article dealing with the suspension and termination of countermeasures, incorporating also the provisions of article 48 as to suspension of countermeasures, adopted on first reading.[706]

(e) Formulation of article 30

362. The remaining question is the formulation of article 30 in Part One. On the assumption that detailed provisions on countermeasures are incorporated in Part 2 *bis*, article 30 can be very simple. It is recommended that it provide:

> "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if and to the extent that the act constitutes a lawful countermeasure as provided for in articles [47]-[50 *bis*]."[707]

4. Countermeasures and the exception of non-performance

363. In his Second Report, the Special Rapporteur recommended that a narrow version of the exception of non-performance (*exceptio inadimplenti non est inadimplendum*) be recognized as a circumstance precluding wrongfulness.[708] The proposal received a mixed reception, and it was agreed to review it in the light of the reconsideration of the provisions on countermeasures.[709] Likewise the views of Governments on the proposal, as expressed in the Sixth Committee in 1999, were mixed.[710]

364. The first question is whether the exception of non-performance is to be considered as a form of countermeasure. It is clear that the exception only applies to synallagmatic obligations (*prestations*), where one party's performance is related to

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[704] See above, para. 319.

[705] See below, para. 367 for the proposed provision.

[706] For the text of the proposed article see below, para. 367.

[707] See the Special Rapporteur's Second Report, A/CN.4/498/Add.4, para. 392.

[708] Ibid., paras. 314-329. The version recommended (as article 30 *bis in* ibid., para. 356) was based on the dictum of the Permanent Court in *Factory at Chorzów (Jurisdiction)*, P.C.I.J., Series A., No. 9 (1927) p. 31, according to which "one Party cannot avail himself of the fact that the other has not fulfilled some obligation ... if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question".

[709] See *ILC Report 1999* (A/54/10), paras. 334-347 for a summary of the debate.

[710] See *Topical Summary* ... (A/CN.4/504), para. 52, summarizing a wide range of responses.

and contingent upon the other's. Normally this will involve performance of the same or a closely related obligation. But in the Special Rapporteur's opinion it is clear that the exception of non-performance is not to be identified as a countermeasure in the sense of article 47. In cases where the exception applies, the reason why State A is entitled not to perform is simply that, in the absence of State B's performance of the related obligation, the time for State A's performance has not yet come. It is true that State A may withhold performance in order to induce State B to perform. But that is not the point of the exception, as it is of countermeasures. State A's motive is irrelevant; it may simply have no interest in performance in the absence of State B. Moreover there is no requirement of notice or of any attempt to settle the dispute by diplomatic or other means as a condition of continued application of the exception. It is simply that, following an agreement, for example, concerning the exchange of prisoners of war or for the joint funding of some project, State A is not obliged to release its prisoners of war to B or to make its contribution unless B is in turn ready to perform its part of the bargain. Thus the exception of non-performance is to be seen either as a circumstance precluding wrongfulness in respect of a certain class of (synallagmatic) obligations, or as limited to an implied term in certain treaties. By contrast, while the nexus between the breach and non-performance is relevant to the question of proportionality, there is and should be no specific requirement of a nexus in the law of countermeasures.[711]

365. But even if it is juridically distinct from countermeasures, and even though it is recognized by a respectable body of international authority and opinion,[712] the exception of non-execution may not warrant inclusion in the draft articles as a circumstance precluding wrongfulness. The essential question is whether the exception is to be conceived in international law as limited to conventional or treaty obligations, i.e. as an inference to be drawn, as a matter of interpretation, from an exchange of obligations in a treaty, or whether it has a broader legal basis.[713] If the former, it can properly be classified as a primary rule and need not be included in the draft articles.

366. There seems little doubt that in its broader form the exception of non-performance should be regarded as based upon treaty or contract interpretation, performance of the same or related obligations being treated as conditional.[714] But the position with the narrower principle recognized by the Court in *Factory at Chorzów (Jurisdiction)* is different. Here the relationship is not between synallagmatic obligations but between the conduct of the two parties: a breach by one party has "prevented" the other from fulfilling the obligation in question. This is

[711] See above, paras. 327-329.

[712] In addition to the authorities cited in the Second Report, paras. 314-329, see also *Klöckner Industrie-Anlagen GmbH v. Republic of Cameroon* (1984) 2 ICSID Reports 95 at pp. 156-159; P. D. O'Neill and N. Salam, "Is the exceptio non adimpleti contractus part of the new lex mercatoria?", in E. Gaillard (ed.), *Transnational Rules in International Commercial Arbitration* (ICC, Paris, 1993), p. 152.

[713] There is a clear analogy with the debate over whether the doctrine of fundamental change of circumstances in the law of treaties was based upon an implied clause in the treaty or was an independent rule of law. The Vienna Convention on the Law of Treaties, article 62, treated it as a rule of law, and this is now the accepted view; see *Fisheries Jurisdiction* case, *ICJ Reports 1973*, at p. 63 (para. 36).

[714] See, for example, D. Ruzié, *Droit International Public* (thirteenth edition, Dalloz, Paris, 1997), p. 48; D. W. Greig, "Reciprocity, Proportionality and the Law of Treaties" (1994) 34 *Virginia J.I.L.* 295 at pp. 399-400.

but an application of the general principle that a party should not be allowed to reply on the consequences of its own unlawful conduct. In the Special Rapporteur's view that principle is capable of generating new consequences in the field of State responsibility, consequences which would be preserved by article 38 adopted on first reading.[715] Whether any specific aspect of that general principle should be included in the draft articles is a matter of judgement. If article 38 is to be retained, however, it is open to the Commission to take the view that the *Factory at Chorzów* principle is sufficiently covered.[716] On that basis, and in the light of the equivocal response it has received, the Special Rapporteur does not press his proposed article 30 *bis*.

5. Conclusions as to countermeasures by an injured State

367. For these reasons, the Special Rapporteur recommends that the following provisions on countermeasures taken by an injured State be incorporated in chapter II of Part Two *bis*:

Part Two *bis*
The Implementation of State Responsibility

Chapter II
Countermeasures

Article 47
Purpose and content of countermeasures

1. Subject to the following articles, an injured State may take countermeasures against a State which is responsible for an internationally wrongful act in order to induce it to comply with its obligations under Part 2, as long as it has not complied with those obligations and as necessary in the light of its response to the call that it do so.

2. Countermeasures are limited to the suspension of performance of one or more international obligations of the State taking those measures towards the responsible State.

Article 47 bis
Obligations not subject to countermeasures

The following obligations may not be suspended by way of countermeasures:

(a) The obligations as to the threat or use of force embodied in the Charter of the United Nations;

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[715] See above, para. 63.

[716] Moreover there are difficulties with its formulation. Where State A's breach absolutely prevents State B's performance (e.g., where State A bars access to its territory or to resources indispensable for the performance by State B of its obligation), State B will be able to plead *force majeure*. If, however, it is still technically possible for State B to perform (e.g., by using its own resources rather than those which State A should have provided), it cannot be said that State A has actually prevented performance: State B's excuse rests on equity, not impossibility. This in turn suggests a need for flexibility in the application of the *Factory at Chorzów* dictum, and reinforces the case for leaving it to be covered by article 38, if that article is to be retained.

(b) Obligations concerning the inviolability of diplomatic or consular agents, premises, archives or documents;

(c) Any obligation concerning the third party settlement of disputes;

(d) Obligations of a humanitarian character precluding any form of reprisals against persons protected thereby;or

(e) Any other obligations under peremptory norms of general international law.

Article 48
Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(a) Submit a reasoned request to the responsible State, calling on it to fulfil its obligations;

(b) Notify that State of the countermeasures it intends to take;

(c) Agree to negotiate in good faith with that State.

2. The injured State may, as from the date of the notification, implement provisionally such countermeasures as may be necessary to preserve its rights under this Chapter.

3. If the negotiations do not lead to a resolution of the dispute within a reasonable time, the injured State acting in accordance with this Chapter may take the countermeasures in question.[717]

4. A State taking countermeasures shall fulfil its obligations in relation to dispute settlement under any dispute settlement procedure in force between it and the responsible State.

Article 49
Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and its harmful effects on the injured party.

Article 50
Prohibited countermeasures

Countermeasures must not:

(a) Endanger the territorial integrity or amount to intervention in the domestic jurisdiction of the responsible State;

(b) Impair the rights of third parties, in particular basic human rights.

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[717] If the Commission decides not to draw a distinction between "provisional" and other countermeasures, the following provision could substitute for paragraphs (1)-(3):

"1. Before countermeasures are taken, the responsible State must have been called on to comply with its obligations, in accordance with article 46 *ter*, and have failed or refused to do so."

Article 50 bis
Suspension and termination of countermeasures

1. Countermeasures must be suspended if:

(a) The internationally wrongful act has ceased;and

(b) The dispute is submitted to a tribunal or other body which has the authority to issue orders or make decisions binding on the parties.

2. Notwithstanding paragraph 1, countermeasures in accordance with this Chapter may be resumed if the responsible State fails to honour a request or order emanating from the tribunal or body, or otherwise fails to implement the dispute settlement procedure in good faith.

3. Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part 2 in relation to the internationally wrongful act.